A

STEMLIFE BHD

v.

BRISTOL MYERS SQUIBB (M) SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[CIVIL SUIT NO: S6-23-95-2008]
9 SEPTEMBER 2009

C ***CIVIL PROCEDURE:*** *Striking out - Application - Defamation suit based on alleged publication of defamatory messages on defendant's interactive website forum by forum's users - Plaintiff's claim frivolous, vexatious and an abuse of court's process - Striking-out allowed - Rules of the High Court 1980, O. 18 r. 19*

D ***TORT:*** *Defamation - Libel - Electronic publication - Internet - Publication of alleged defamatory messages on defendant's interactive website forum by forum's users - Whether defendant responsible as forum's official service provider of forum - Defendant merely performing passive*
E *role in facilitating postings on forum - Elements of publication not established - Defamatory statements posted on website were views of individual users and not of defendant - No opportunity for defendant to edit or check on postings before being posted on forum - Hyperlinking of website does not amount to republication of contents of original site -*
F *Defamation not established*

TORT: *Defamation - Libel - Electronic publication - Internet - Internet service provider - Whether a publisher at common law*

The plaintiff claimed against the defendants for libel based on
G numerous messages, including a hyperlink, to an external blog created and posted by the users of the 1st defendant's website forum. The plaintiff alleged that the 1st defendant was responsible as publishers, authors and/or editors of the website for the defamatory statements by the users of the forum in the 1st
H defendant's website. The 1st defendant was an established international pharmaceutical company. In 2003, the 1st defendant set up a website (www.meadjohnsonasia.com) which provided the 1st defendant with an online platform to update Asia's customers with the latest product information, activities and news of the 1st
I defendant's business. The website also contained an interactive forum known as Asian Mom's Network. The forum was aimed at promoting a free exchange of users' thoughts, views and

information on various issues for the betterment of their healthcare and parenting needs. Thus the 1st defendant was the official service provider of the forum. The 1st defendant applied to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(a) or (b) and/or (d) of the Rules of the High Court 1980 ("RHC") on the basis that it disclosed no reasonable cause of action or it was frivolous, vexatious and an abuse of court process.

Held (allowing application with costs):

(1) The nature of statements printed in media like newspaper or books are of a different nature as compared to statements which are posted in the internet or websites. In the case of a matter that is to be printed in books or newspapers, the editor or publisher would have the opportunity to edit or vet the material first before it is put in printed form. However, in the case of an individual posting his/her views or statements on to the website, which more often than not is not being subjected to editing, the owner or proprietor of the website would not be in the know of what is to be put up on the website until it is on the website, by which time damage is already done. (para 24)

(2) There was no positive overt acts on the part of the 1st defendant in circulating the alleged defamatory words. To amount to publication there must be: (a) some positive overt act on the part of the defendant in disseminating the alleged defamatory remarks or statements; and (b) the defendant must have control on the circulation of the statements or words complained of. These two requisites were not present on the facts of the case. The 1st defendant was merely an internet service provider performing a passive role in facilitating postings on the internet and thus was not a publisher at common law. (paras 38, 44, 45 & 46)

(3) The authors of those defamatory statements were the individual users of the forum which was posted directly onto the forum of the 1st defendant's website. It was the views of these individual users and not that of the 1st defendant which are being posted onto the website. There was no participation by the 1st defendant and neither was there any positive involvement on the part of the 1st defendant when the individual users posted their views or statement on the

website. There was also no opportunity for the 1st defendant to edit/vet or check on the postings authored by the individual users before it was posted on the forum. The fact that the 1st defendant could edit after the postings were put up did not give the 1st defendant an "opportunity" to edit and this did not amount to "control". (para 54)

(4) The 1st defendant was also not responsible for the publication of the hyperlink to the External Blog. The hyperlinking of websites did not amount to a republication of the contents of its original site. (para 54)

(5) The plaintiff's claim against the 1st defendant was frivolous, vexatious and an abuse of court's process. This was therefore a plain and obvious case for striking out under O. 18 r. 19(1) RHC. (para 55)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Bunt v. Tiley & Ors [2006] 3 All ER 336 ***(refd)***
Crookes v. Wikimedia Foundation Inc [2008] BCJ No 2012 ***(refd)***
Cubby v. CompuServe Inc [1991] 776 F.Supp 135 ***(refd)***
Hird v. Wood [1894] 38 SJ 234 ***(refd)***
Godfrey v. Demon Internet Ltd [1999] 4 All ER 342 ***(refd)***
Lawrence v. Newberry [1891] 64 LT 797 ***(refd)***
Lindley v. Delman 26 P.2d 751 919330 ***(refd)***
Norwich Pharmacal Co v. Customs and Excise Commissioners [1974] AC 133 ***(refd)***
Pullman v. Hill & Co [1891] 1 QB 524 ***(refd)***
Stemlife v. Bristol-Myers Squibb (M) Sdn Bhd [2008] 6 CLJ 200 HC ***(refd)***
The New Straits Times Press (M) Bhd & Ors v. Ahirudin Attan [2008] 8 CLJ 56 HC ***(refd)***

Legislation referred to:

Legal Profession (Practice and Etiquette) Rules 1978, r. 28
Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)

Other source(s) referred to:

Gatley, *"Libel and Slander"*, 10th edn, paras 6.5, 6.17
Halsbury's Laws of England, 4th edn, vol 28, p 19, para 38
Starkie's Law of Slander and Libel, 2nd edn, vol ii, p 225

For the plaintiff - Rishwant Singh (Farah Shuhadah Razak with him); M/s Zul Rafique & Partners)
For the 1st defendant - Yee Mei Ken (K Kavitha with her); M/s Shearn Delamore & Co

Reported by Amutha Suppayah

JUDGMENT

Zabariah Mohd Yusof J:

[1] Enclosure 11 is the 1st defendant's application to strike out the plaintiff's statement of claim under O. 18 r. 19(1)(a) or (b) and/or (d) Rules of High Court 1980 on the basis that it discloses no reasonable cause of action or it is frivolous, vexatious and an abuse of court process.

Background Facts

[2] The plaintiff's claim against the defendants is for libel based on numerous messages, including a hyperlink, to an external blog created and posted by the users of the 1st defendant's website forum.

[3] The plaintiff alleged that the 1st defendant is responsible as publishers, authors and/or editors of the website for the defamatory statements by the users of the forum in the 1st defendant's website. These statements are pleaded in the statement of claim.

[4] The 1st defendant is an established international pharmaceutical company whose business includes the sale of nutritional products for infants and children. In 2003, the 1st defendant hired the 2nd defendant (web agency) to set up a website (www.meadjohnsonasia.com) which provides the 1st defendant with an online platform to update Asia's customers with the latest product information, activities and news of the 1st defendant's business.

[5] The website also contains an interactive forum known as Asian Mom's Network. The forum is aimed at promoting a free exchange of users' thoughts, views and information on various issues for the betterment of their healthcare and parenting needs. Thus the 1st defendant is the official service provider of the forum.

[6] In the terms and conditions of the website the 1st defendant expressly reserves its right to edit any postings published on the website.

[7] Previously the plaintiff applied for and obtained a Norwich Pharmacal Order against the 1st defendant.

[8] The 1st defendant's grounds in support of the application to strike out the plaintiff's claim is premised on the fact that on the face of the pleadings the plaintiff failed to show that the 1st defendant is the publisher of the words complained of in the website and the hyperlink to the external blog. The 1st defendant had summarized its involvement in the alleged publication of the words complained of in the forum as follows:

a) The 1st defendant has no knowledge or control of the contents of the postings made by the forum users;

b) The 1st defendant merely provide the website as a platform for the users to post their views;

c) The 1st defendant had no opportunity to edit or vet the postings before they were put on the website;

d) The 1st defendant did not contribute to the postings and neither do the 1st defendant participate in the forum.

e) The 1st defendant merely played a passive role in facilitating the postings on the forum.

f) The 1st defendant's term and conditions of use expressly states that the contents of the postings made on its forum are the views and opinions of the individual users of the forum and not that of the 1st defendant;

g) The 1st defendant has a monitoring system by "community reporting and "keyword alerts" whereby there are supervisors from both the 1st and 2nd defendant who will be alerted *via* e-mail from any users who can indicate to these supervisors of any offensive postings or any usage of undesirable words or language.

The Plaintiff's Contention

[9] The plaintiff raise a preliminary point in that the primary grounds in support of the 1st defendant's application is the allegation that the plaintiff (through its previous counsel in the Norwich Pharmacal proceedings) gave certain "assurances and representations" to the 1st defendant that it would discharge any rights or claims which the plaintiff may have against the 1st defendant arising out of the words complained of in the Website during the Norwich Pharmacal Proceedings, which is strongly

denied by the plaintiff. The 1st defendant was represented by the same firm at that time and therefore the plaintiff submits that the court ought to take cognizance of r. 28 of the Legal Profession (Practice and Etiquette) Rules 1978. The plaintiff submits that solicitors for the 1st defendant is a potential witness in view of these "assurances and representations" and thus should not be representing the 1st defendant herein.

[10] As far as the merits of the application herein is concerned, the plaintiff submits that it is clear that an editor and a publisher can be sued for libel. The common law of Malaysia allows for a proprietor and an editor of a libelous publication to be just as liable for the publication of a libel as the author or distributor of a libel. The defendant cited the authority as stated in *Halsbury's Laws of England* (4th edn) vol. 28 at p. 19 para 38 which states as follows:

> JOINT AND SEVERAL LIABILITY: Every person who takes part in or procures the publication of a libel is *prima facie* liable jointly and severally for all damage caused by it. Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor and printer, publisher and vendor of the newspaper are all *prima facie* jointly and severally liable.

[11] The 1st defendant is the proprietor of the website. Hence it has control of what is published or not to be published on the website. It is not merely as editor of the same.

[12] The fact that the 1st defendant had removed the alleged libelous statement after being informed is no defence as these libels were perpetrated for many weeks.

[13] The plaintiff further draws this court's attention to para 6.17 of Gatley 10th edn on *"Libel and Slander"* which reads:

> Internet service providers and other carriers: common law.
>
> The author (That is to say the originator) of material on the internet clearly publishes it on general principles. So a person who creates a website publishes the information on it when it is accessed by a human being. It has been held in England that an internet service provider is a publisher of material which it "hosts" where it is aware that the material is defamatory and the judge was of the opinion that the same was true even if there was no such knowledge.

[14] The plaintiff argues that despite the disclaimer which was present on the website which states that views posted on the website are not necessarily the views of the 1st defendant, libels are actionable regardless of whether the libels represent the views of the publisher. The 1st defendant has thus failed to show how could this be a defence to the allegation of libel.

[15] The 1st defendant had participated in and permitted the distribution and publication of the various libels as stated in the statement of claim. The plaintiff reiterates that by allowing the website to be up and running, the 1st defendant has further actively engaged in the distribution and publication of the libels. Gatley on *Libel and Slander*, 10th edn at para 6.5 is the authority quoted by the plaintiff:

> The question is whether the defendant has communicated the defamatory matter to others and this may be done in a variety of ways. Apart from obvious cases, like sending a defamatory letter or publishing a book or transmitting a broadcast, there may be publication if the defendant draws the attention of others to an existing libel or even leaves it in a place where they are likely to see it, provided someone does so. It has been held that where defamatory matter is placed in a visible manner on the defendant's property by some third party for whom he is not responsible, he may be treated as publishing the matter if he elects to leave it there ... An internet service provider upon whose site defamatory material is placed by another may incur liability for failure to remove it.

[16] My attention is further drawn to the judgment in the case of *Stemlife v. Bristol-Myers Squibb (M) Sdn Bhd* [2008] 6 CLJ 200 which had ruled that the 1st defendant had facilitated the wrongdoings of other users of the said website. The presiding judge had stated that the defendant is said to be involved in the act of wrongdoers in facilitating the wrongdoing. Premised on this the plaintiff argued that this is certainly not a plain and obvious case that warrants striking out.

]17] The plaintiff is also claiming against the 1st defendant for allowing hyperlinks to other defamatory materials elsewhere on the internet to be accessible to readers who log on to the 1st defendant's website. Plaintiff cited the case of *Lindley v. Delman* 26 P.2d 751 919330 Supreme Court of Oklahama where it ruled that the showing of a libelous letter and the issuance of a request

to others to visit a place where the libelous statements could be viewed was held to constitute a publication under the definition of defamation. Further in the case of *Lawrence v. Newberry* [1891] 64 LT 797 it concerned a letter to a newspaper referring to a speech containing defamatory content which was published elsewhere attracted liability for libel. The defendant quoted the case of *Hird v. Wood* [1894] 38 SJ 234 where the defendant sat beside a placard containing defamatory remarks and drew the attention of all passers by to the defamatory remarks. The court did remark that it was uncertain as to who had put up the placard, nevertheless the court found that the defendant is liable for libel (in drawing the attention of passers by to the placard).

[18] The plaintiff submits that the 1st defendant has clearly understated its involvement in respect of the various publications on the website and reiterates that the undisputed fact that the 1st defendant is the owner and the editor of the website shows that the 1st defendant thus controls what is published or not published on the website.

[19] The contention of the 1st defendant that it has no opportunity to edit any posting is untenable. The fact that the 1st defendant's own admission that the 1st defendant had removed the words published on the website clearly demonstrates the 1st defendant's editorial control and ownership *vis-a-vis* the forum and the website.

[20] The mere fact that the 1st defendant is not the author of the libels in question does not preclude the plaintiff from bringing an action in libel against the 1st defendant (as publishers of the libel).

The Court's Findings

The "Assurances And The Representations" And r. 28 Of The Legal Profession (Practice And Etiquette) Rules 1978

[21] The 1st defendant's counsel had aborted this issue and it was never a basis in their argument before this court. Therefore this issue does not arise.

[22] As to the merits of the application herein, it is not disputed and neither is it an issue between the plaintiff and the 1st defendant that the words complained of is defamatory of the

plaintiff. The issue that is in dispute between the parties is as to whether the 1st defendant is the publisher of the alleged defamatory statements.

[23] It is not disputed that the 1st defendant is a service provider on the internet for the forum and the website. It is also not disputed that the 1st defendant owns the website.

Element Of Control In Publication

[24] First and foremost I would like to stress that the nature of statements printed in media like newspaper or books is of a different nature as compared to statements which is posted in the internet or websites. The difference is not as to the result after it is printed but more so at the beginning before the statement or matter is put in printed form. Take for instance a matter that is to be printed in books or newspapers, the editor or publisher would have the opportunity to edit or vet the material first before it is put in printed form. The issue of whether the editor or publisher did really read or edit the material, does not matter, but what is of importance is that he would have the opportunity to ensure that before it is put in printed form, the words or the statement do not offend others. Thus the editor or the publisher would have notice or at least knows what is about to be printed. Compare this with the situation of an individual who posts his/her views or statements on to the website, which more often than not is not being subjected to editing; the owner or proprietor of the website would not be in the know of what is to be put up on the website until it is on the website, which by that time the damage is already done. Now, can the owner or proprietor of a weblog/ website be responsible for such acts of individuals when there is no advance knowledge or notice been made available to him as to the defamatory statements about to be made on to his website.

[25] My considered view on this is that as in the example of printing of materials in the newspapers or books, there is some element of control which is present in the publisher or the editor, whereas there is none as in internet service providers such as the 1st defendant. Here we are talking about before the words or statements are to be printed. No doubt the 1st defendant can remove any postings on the website, however that is after it has been put on the website, not before. This is the sort of control that is available to the 1st defendant.

[26] The manner of postings being put onto a website is that it appears directly on the website at the click of a button. This is where the 1st defendant loses its control *vis-a-vis* as to what is to be put on the website.

[27] As for the ruling of the presiding judge in the case of *Stemlife v. Bristol-Myers Squibb (M) Sdn Bhd*, in that the 1st defendant had facilitated the wrongdoings of other users of the said website. The presiding judge had stated that the defendant is said to be involved in the act of wrongdoers in facilitating the wrongdoings. However that ruling or finding of the judge was not on the liability of the 1st defendant. This is clear when the court held as follows:

> In *Norwich Pharmacal Co v. Customs Excise Commissioners*, the claimant was allowed to seek disclosure from any party who had information identifying a wrongdoer so that an action can be brought against the wrongdoer where otherwise the claimant would not be able to do so. The benefit of discovery is always available against anyone whom the plaintiff has a cause of action. In the present case, the court need not decide whether or not the Defendant was liable for the same wrong against the plaintiff as that committed by the users with the names of "stemlie" and "kakalily". The question to be answered was whether the defendant facilitated their wrongdoing.

[28] I am also minded of the fact that the decision in the case of *Stemlife v. Bristol-Myers Squibb (M) Sdn Bhd* was pertaining to an application for a Norwich Pharmacal Order by the plaintiff. A Norwich Pharmacal Order is basically a discovery order. The case is not about finding of liability on the part of the 1st defendant. This is illustrated in the case of *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133 where the claimant was the owner and exclusive licensee of a patent for a chemical compound, furazolidone. There have been unlicensed consignments of the said compound being imported into the UK, thus infringing the patent. The defendants however had records of the identity of the importers. The claimant had failed to determine the identity of the importers and brought a claim against the defendants, for amongst other things, an order for disclosure of the names and addresses of the importers of furazolidone, the quantity imported by each importer and any other relevant documentation. The defendants objected to production of the documents on the grounds that such disclosure would be injurious to the public

A interest because they contained confidential information. It was assumed that the patent was valid and there had been an infringement of patent when the consignments were imported. The judge granted the order for disclosure. The Court of Appeal allowed the defendants appeal and the claimant appealed to the B House of Lords.

[29] Allowing the appeal and granting the order for discovery it was held that:

> C Discovery to find the identity of a wrongdoer was available against anyone against whom the claimant had a cause of action in relation to the same wrong. However, it was true as a broad and general rule that a court would not order discovery against a mere witness or a party against whom no reasonable cause of action existed. An order for discovery was not available against a D person who had no other connection with the wrong than that he was a spectator (eg, against a bystander to a road accident who happened to note the licence plate number of the car) or had some other document relating to it in his possession.
>
> On the other hand, if through no fault of his own a person E became mixed up in the tortious act of others so as to facilitate their wrongdoing, he might not incur personal liability, but he came under a duty to assist the person who had been wronged, by giving him full information and disclosing the identity of the wrongdoers. It did not matter whether he became so mixed up F by voluntary action on his part or because it was his duty to do what he did.
>
> This principle would operate regardless of whether the person mixed up, incurred any minor liability, and whether or not proceedings were brought against him. In the circumstances the G public interest lay in granting the order sought.

[30] Thus the order which was granted in *Stemlife v. Bristol-Myers Squibb (M) Sdn Bhd* was on the basis that the 1st defendant as service provider had got so mixed up in the tortuous acts of "Kakalily" and "Stemlie" through no fault of its own and thus H under a duty to assist the plaintiff in disclosing the information of the identity of "stemlie" and "kakalily" to the plaintiff.

Whether The 1st Defendant Is The Author/Publisher

I **[31]** What is clear in our case is that the authors of such defamatory statements have been identified, with pseudonyms as "mother to be", "goodmum", "stef-lae", "kakalily", "joo6699",

"fion27", and "stemlie". Therefore the 1st defendant cannot be the author of the words complained of under the law of defamation. A

[32] The next issue is whether the 1st defendant can be termed as the publisher of the words complained of under the law of defamation. B

[33] "Publication" has been defined by Lord Esher MR in *Pullman v. Hill & Co* [1891] 1 QB 524 at p 527 as:

> The making known the defamatory matter after it has been written to some person other than the person of whom it is written. C

[34] The cases of *Lindley v. Delman, Lawrence v. Newberry, Hird v. Wood, Bryne v. Deane* cited by the plaintiff where impliedly the plaintiff is contending that mere passive role can amount to publishing the defamatory statements, has to be distinguished on its facts. D

[35] The case of *Lindley v. Delman* where the plaintiff, Mrs Delman instituted action against the defendant, Miss Lindley for damages as a result of libel which was circulated *via* a typewritten instrument purporting to be an anonymous letter. The defendant received the document through the mails addressed to her, that she circulated the letter among the parties in and about the county headquarters of her political organization. The facts shows that the defendant took the letter to the county organization of her political party and exhibited there. This finding is further supported by evidence that the defendant personally exhibited the document to several persons and that she requested other persons to go to the place where it was available to see and read it. The court found that from the evidence the defendant did publish and circulate the matter and that it was false. E F G

[36] *Lawrence v. Newberry* involves a defendant who had published a letter in a newspaper in which she referred all readers to a certain speech made in the House of Lords. That speech contained a passage which, would have constituted a libel as against the plaintiff if it is not privileged. H

[37] The facts of *Hird v. Wood* is that a placard was suspended between two poles was exhibited on the roadway near a gate leading into the grounds where a gala was taking place. On the I

placard were written the alleged defamatory words. There was no evidence as to who had put up the words on the placard, or who put it up near the highway, however there was proof that the defendant took his position near the placard, remained there for a long time, sitting on a stool smoking a pipe while continuing pointing to the words on the placard with his finger attracting passers by. It was argued that although the defendant said nothing, "yet the calling to the attention of the public to the placard continually pointing to it continuously amounts to publication."

[38] All the three cases above shows that there were some positive overt acts by the defendants in each of the cases disseminating the alleged defamatory statements. Compare these with our present case, there was no positive overt acts on the part of the 1st defendant in circulating the alleged defamatory words.

[39] In *Byrne v. Deane*, the two defendants in the case were proprietors of a golf club, while the plaintiff was a member of the golf club. Among the provision of the rules of the golf club was that "no notice or placard shall be posted in the club premises without the consent of the secretary." The defendant had kept certain gambling machines on the club premises for the use of the members of the club. The machines were subsequently confiscated by the police upon information by certain individuals. The next day someone put up on the notice board of the club a typewritten paper containing certain verses which impliedly referred to the plaintiff as the person who gave the information to the police about the presence of the gambling machines in the club. The plaintiff brought libel action against the two defendants. Hilbert J held that:

> ... the words were defamatory of the plaintiff, and that as the defendants had complete control of the walls of the club and could have removed the paper after they had seen it, the publication had been made with their approval.

[40] In *Byrne v. Deane* the defendants had admitted that they saw the notice on the wall, however they denied having written the alleged defamatory verses and neither did they put it there. One of the defendant gave evidence at the trial that as secretary she was responsible for consenting to any notices that were posted in the club, and "that she might have removed the verse if she had thought it harmful, but she thought that one member of the club was poking fun at another."

[41] In the same case, Greene LJ in determining whether there was publication, states the following in his judgment: A

> In the present case there was never any publication by the 2 defendants, and the fact that they allowed the lampoon to remain on the wall of the club for some days cannot amount to publication. A man does not publish a libel which he sees upon the walls of his house because he does not remove it. If, however, he draws the attention of passers by to the libel he is adopting it and republishing it. But merely permitting the libel to remain on the wall without doing an overt act cannot amount to a publication of the libel. B C

[42] Slesser LJ in *Byrne v. Deane* quoted what is stated in *Starkie's Law of Slander and Libel*, 2nd edn, vol. ii, p 225 which states:

> "According to the general rule of law, it is clear that all who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as principals in the act of publication" and at page 239 "Upon the whole ... it seems to be perfectly clear that every person who maliciously lends his aid to the construction of a libel, subsequently published, or who contributes to the publication of one already made, with the knowledge of its contents, is indictable as a principal for the whole mischief produced. D E

[43] It was also reported in the judgment by Slesser LJ that Mr. Deane had knowledge of the libel on the wall but he did nothing. The act of leaving the notice on the wall amounted to an overt act by the two defendants and that they were responsible for the publication of this libel. Compared to the 1st defendant in our case, unlike Mr. Deane, the 1st defendant has no knowledge of the words complained of until it was brought to their attention, which subsequently led the 1st defendant in removing all the postings and words complained of by the plaintiff and closing the accounts of the author of the alleged defamatory words, as soon as the same were brought to the 1st defendant's knowledge. F G

[44] The principle that can be derived from the cases above is that to amount to publication there must be: H

a) some positive overt act on the part of the defendant in disseminating the alleged defamatory remarks or statements;

b) the defendant must have control on the circulation of the statements or words complained of; I

[45] These two requisites are not present in the facts of our case.

[46] The 1st defendant is merely an internet service provider which performed a passive role in facilitating postings on the internet and thus cannot be deemed a publisher at common law, as was illustrated in the case of *Bunt v. Tiley & Ors* [2006] 3 All ER 336 where it was held that:

> An internet service provider which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law. It was essential to demonstrate a degree of awareness or at least an assumption of general responsibility, such as had long been recognised in the context of editorial responsibility, in order to impose legal responsibility under the common law for the publication of words. Although it was not always publication, there had to be knowing involvement in the process of publication of the relevant words. It was not enough that a person had played merely a passive instrumental role in the process. On the evidence in the instant case the claimant had no realistic prospect of being able to establish that any of the internet service provider defendants had, in any meaningful sense, knowingly participated in the relevant publications ...

[47] The 1st defendant in their submission had cited American cases. I am minded to exercise caution when citing American cases because of the 1st amendment which has resulted in a substantial divergence of approach between the American and the English Law on defamation cases. Nevertheless I am of the view that those cases cannot be set aside entirely considering the development of the internet era which is of recent origin and the present case law authorities on such matter which is certainly lacking. As indicated by Morland J in *Godfrey v. Demon Internet Ltd* [1999] 4 All ER 342, those American decisions are "educative and instructive as to the workings of the internet and the problems which arise when defamatory material finds its way into the internet".

[48] Hence, in the American case of *Cubby v. CompuServe Inc* [1991] 776 F.Supp 135 where the court ruled that CompuServe's editorial control over the contents of the forum were no more than that of a public library or book store. It would not be feasible for CompuServe to examine every posting it carries for potential defamatory statements.

[49] The New York Court of Appeal in the case of *Lunney v. Prodigy Services Co* which was decided on 2 December 1999 (unreported) ruled that even if Prodigy were to exercise the power to exclude certain vulgarities from the text of certain bulletin board messages, this would not alter its passive character in the "millions of other messages in whose transmission it did not participate". It was held that Prodigy was not the publisher of the bulletin board messages.

[50] The plaintiff submits that the suggestion by the defendant in its submission that defamatory articles will always be vulgar and that libelous matters on the 1st defendant's website (over which the 1st defendant has ownership and editorial control) will similarly be reported and that this, if done, constitutes not just a defence but a bar to any claim for libel, is unsubstantiated by any authority. I think the plaintiff had misconstrued the submissions of the 1st defendant on this point. The community reporting and the "keyword alerts" are ways in which the 1st defendant exercise control on what is being posted onto its website. There is nowhere in the submissions of the 1st defendant that states that defamatory publications will always be vulgar.

Hyperlink To An External Blog

[51] Besides the postings made on the forum, the plaintiff further complains that the 1st defendant is responsible for the purported publication of a hyperlink to an External Blog, that was posted on the forum by a user of the forum known by pseudonym "Stemlie". There has not been many local cases on this point but one case which bears a close resemblance to our facts is the case of *The New Straits Times Press (M) Bhd & Ors v. Ahirudin Attan* [2008] 8 CLJ 56 where the court held that the respondent, a blogger, could not be held liable as publisher of the "Walk With Us" weblog by reason of the hyperlink on his own weblog which linked the "Walk With Us" weblog with his weblog. It was held that:

> The respondent could not be held liable over the contents of the "Walk With Us" weblog. He was neither the author nor the publisher of that weblog. The "Walk With Us" weblog was an anonymous weblog. It was far fetched to contend that although the respondent was not the author of the "Walk With Us" weblog, nonetheless, he must, as a matter of law, be taken to be the publisher of that weblog by reason of the hyperlink on his weblog which linked the "Walk With Us" weblog with his

A weblog; there was a republication by the Respondent merely by reason of the hyperlink appearing in his weblog. In the present case, however, there was only a "passive" reference to the hyperlink; only the name/title of the hyperlink "Walk With Us" appears on the right hand column of the weblog together with the names/titles of about 85 other hyperlinks.

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[52] Another case which is on point though not a Malaysian case, which may be of assistance is the Canadian case of *Crookes v. Wikimedia Foundation Inc* [2008] BCJ No. 2012, where it was held that the mere creation of a hyperlink on a website did not C lead to a presumption that persons read the contents of the website and used the hyperlink to access the defamatory words. Although a hyperlink provided immediate access to material published on another website, this did not amount to a republication of the content of the originating site.

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[53] Therefore taking the queue from the above cases into consideration, the 1st defendant thus cannot be held responsible for the purported publications of the words complained of and the hyperlink to the External Blog on its forum. Consequently there is E no cause of action against the 1st defendant.

Conclusion

[54] Therefore, from the abovementioned, it is without doubt that:

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i) the authors of those defamatory statements are from individual users of the forum which was posted directly onto the forum of the 1st defendant's website. It is the views of these individual users and not that of the 1st defendant which are G being posted onto the website;

ii) There was no participation by the 1st defendant and neither was there any positive involvement on the part of the 1st defendant when the individual users posted their views or H statement on the website;

iii) There was no opportunity for the 1st defendant to edit/vet or check on the postings authored by the individual users before it is posted on the forum. The fact that the 1st defendant can edit after the postings are put up does not give the 1st I defendant an "opportunity" to edit and this does not amount to "control" as envisaged by the legal literature;

iv) It is clear that the 1st defendant is not the publisher of the words complained of, nor does it play any active role in the publication of the words complained of. The words complained of were the views of individual users who logged on to the forum of the 1st defendant's website. The 1st defendant had no knowledge of the words complained of and only became aware of the words complained of when it was notified of the same by the plaintiff's solicitors on 18 September 2007. In fact the 1st defendant had acted immediately upon the plaintiff's request to remove all the defamatory postings complained of by the plaintiff on 21 September 2007. Further steps were taken by the 1st defendant to deactivate the accounts of two users ie, "kakalily" and "stemlie", which were the source of the plaintiff's complaints. Hence the words complained of have been completely taken off from the 1st defendant's forum before the commencement of the suit herein;

v) The 1st defendant is also not responsible for the publication of the hyperlink to the External Blog. The hyperlinking of a website does not amount to a republication of the contents of its original site.

[55] Therefore the plaintiff's claim herein against the 1st defendant is frivolous, vexatious and an abuse of the court's process. Hence based on the Supreme Court decision in the landmark case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, this is a plain and obvious case for striking out under O. 18 r. 19(1) Rules of High Court 1980.

[56] The 1st defendant's application in encl. 11 is allowed with costs.